

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7510

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELGIE & COMPANY,

Plaintiff-Appellant,
(Docket No. 76-7510)

—against—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH
AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant, (Docket No. 76-7562)

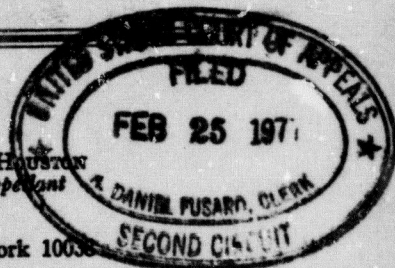
—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INC.,

Third-Party Defendant-Appellee.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Statement

Defendant South African Marine Corporation, Ltd. has filed a brief in which it calls itself appellee-appellant-cross-appellant, and in that brief has supported the District Court's opinion limiting plaintiff's recovery to \$500.00, but

seeking modification of the Judgment against International Terminal Operating Co., Inc., Third-Party Defendant, so as to grant indemnity including counsel fees. It has designated a portion of its brief as a "protective appeal" in the event the Court should modify the award as to that portion of the judgment granting relief to Elgie.

This Reply Brief is in answer to Point I of appellee-appellant-cross-appellant's brief and deals with its answer to plaintiff-appellant Elgie's brief. There appears to be no cross appeal to be answered.

POINT I

There was an important misrepresentation in the issuance of the "on-board" bill of lading and it was relied upon to plaintiff Elgie's detriment.

It must first be noted that South African Marine Corporation, Ltd. did *not* issue a "Received for Shipment" bill of lading on March 15, 1974, as stated in its brief on page 3. The facts set forth in the record are clearly to the contrary. When the goods were delivered to the pier on March 13, 1974, a dock receipt was issued to the shipper (138a). On March 15, 1974 the record indicates (177a) that a messenger from the freight forwarder delivered the dock receipt along with copies of a proposed bill of lading to the steamship carrier. The proposed bill of lading was placed into a machine which put an identifying perforation number on it as well as on all the non-negotiable copies (178a). No bill of lading was actually issued at that time.

The steamship company held the bill of lading until the vessel had sailed and the freight had been paid. The testimony indicates that the "on-board" bill of lading was

received by the freight forwarder some time after March 22, 1974 and that the freight bill had a notation "paid March 22nd" (181a). There is nothing in the record to indicate that on March 22, 1974 the shipper returned the bill of lading and asked South African Marine Corporation, Ltd. to place an "on-board" stamp on the bill of lading, as stated in the South African Marine brief, page 4.

The only testimony in the record relating to the handling of the bill of lading was the testimony of the freight forwarder who stated that the messenger leaves the bill of lading there, and it is received back at a later date (179a). When it was received back it had the name of the vessel changed from the "MORGENSTER" to the "NEDERBURG" (180a) and it contained the "Received on-board March 22, 1974" stamp (181a).

Had any of the Elgie cargo gone on the "MORGENSTER", South African Marine Corporation, Ltd. states on page 7 of its brief: "* * * the bills of lading would have been modified accordingly". South African Marine indicated clearly in its brief its skepticism of the one missing crate going on the "MORGENSTER". It rightfully points out, on page 7 of its brief, that the only indication that the crate was loaded on the "MORGENSTER" was an *unsigned* tally—the *only unsigned* tally on that ship.

This unsigned tally is referred to in the District Court's opinion (Note 7) (31a), where it indicates that "one piece was placed on the string piece on the pier on that date, and that it had not been removed from that point, and therefore, must have been loaded." (If it had not been removed from that point, it is difficult to see how it was loaded).

Although the bill of lading indicated that all 12 pieces of the cargo had been loaded aboard the "NEDERBURG" on March 22, 1974 the stevedore's records reveal that only 11

cartons were loaded, and this over a 3-day period commencing on that date, (9a). This clearly, by any standard is a misrepresentation. The fact that the bill of lading is issued routinely, as set forth on page 7 of the South African Marine brief, does not make it any less a misrepresentation. As Judge Clark stated in his dissenting opinion in *Toho Bussan Kaisha, Limited v. American President Lines Limited*, 265 F2d 418, 425 (2nd Cir. 1959) " * * * the fact that it (the steamship carrier) may have felt compelled to its course by the exigencies of business competition, does not lessen its responsibility to plaintiff, which clearly suffered loss." This statement, although in the dissenting opinion, does not appear to be in conflict with anything said in the District Court or majority opinion.

Although South African Marine states in its brief, page 11, that no evidence was offered by Elgie as to reliance, it is clearly established in the record that plaintiff's irrevocable letter of credit required an "on-board" bill of lading (588a). Had the shipper gone to the bank with a bill of lading of any other sort, it could not have negotiated it, and it would not have been paid for its goods.

The fact that the South African Marine Line may have relied entirely on its terminal operator for records of receipt and loading, is no indication that it used such receipts and records of loading, but even if it had, it is responsible for the acts of the stevedores and terminal operators—not because they are agents of the carrier—but because the carrier has a non-delegable duty to cargo. This is conceded by South African Marine at page 19 of its brief.

POINT II

The dock receipt is not binding on the consignee.

Although the bill of lading extends the U. S. Carriage Of Goods By Sea Act of 1936 throughout the entire time the goods are in the custody of the carrier and the dock receipt incorporates the terms of the bill of lading, this does not limit the consignee's recovery to \$500.00 in the instant suit, since the bill of lading would never have been purchased but for the false information contained thereon. The consignee Elgie had no knowledge of the dock receipt, nor was it one of the documents presented to the Barclay Bank. There is no question that the *shipper* accepted the terms and conditions of the carrier's bill of lading including its limitation of liability provisions by accepting the dock receipt. The cases set forth by South African Marine in Point I of their brief, *Eastman Kodak v. Transmariner, et al.*, 1975 A.M.C. 123 (SDNY 1974); *Berkshire Knitting Mills v. Moore-McCormack Lines, Inc.*, 1966, AMC 2651, 2653, 265 F. Supp. 846, 848 (S.D.N.Y. 1965); *John Deere & Co. v. Mississippi Shipping Co.*, 1959 AMC 480, 170 F.Supp. 479 (E.D. La. 1959); all relate to shippers with cargo damaged at loading, prior to the issuance of a bill of lading. In each case the plaintiff was the *shipper*.

It is very interesting to note, however, that in each case cited by South African Marine Corporation, Ltd. there was no bill of lading issued; no on-board bill of lading negotiated against an irrevocable letter of credit; and in no instance did an innocent consignee rely upon a false bill of lading. The only case cited in the South African Marine's brief, which related to a suit brought by a consignee, *Toho Bussan Kaisha Ltd. v. American President Lines, Ltd.*, 265 F2d 418 (2nd Cir. 1959) was discussed in plaintiff Elgie's brief at page 5. There the Court barred the defenses in the bill of lading, because of mis-

representations therein. South African Marine at page 11 states that this was so because " * * * the plaintiff in the *Toho* case was not a party to the contract of carriage and consequently could not be bound by its terms." In the instant case Elgie & Company was not a party to the making of the contract, but was solely a "Notify" party on the bill of lading. South African Marine attempts to simplify this by arguing at page 11, that, after all, this case represents nothing more than non-delivery of cargo. This is an over simplification. Plaintiff suffered a substantial loss, which it would not have suffered, save for the false bill of lading.

With respect to the possibility, or probability, that the crate in question was loaded aboard an earlier vessel, the S.S. "MORGENSTER", South African Marine itself has taken a position of skepticism in its Statement of Facts. It states at pages 3 & 4: "No evidence was produced by ITO that any part of the shipment had been loaded on the "MORGENSTER" other than the unsigned tally". It reiterates this at page 5, and adds that the crate did not outturn from the "MORGENSTER" at Durban or any other African port, and once again states at page 7, that had it been loaded on the "MORGENSTER" the bill of lading would have been modified. South African Marine agrees, at page 7, that there was no indication on the dock receipt that one crate went on the "MORGENSTER".

South African Marine further points out, at page 21, that "the District Court admitted that the evidence that the missing crate was loaded on board the "MORGENSTER" 'was far from conclusive' * * * the tally itself contained unexplained discrepancies." South African Marine then goes on to set forth "a plausible explanation as to what happened to the missing package" as testified to by an ITO receiving clerk at pages 21-23.

Who could be in a better position to state that it believed that the cargo did not go on the "MORGENSTER", and did not outturn from the "MORGENSTER", than the steamship carrier itself, which had custody and control of the cargo? Had the one crate gone forward on the "MORGENSTER" and been delivered to Elgie—even though it was under a false bill of lading—there would be no loss, and therefore, no lawsuit.

B.F. McKernin & Co., Inc. v. United States Lines, 416 F. Supp. 1068 (SDNY 1976) referred to by South African Marine on page 15 of its brief, is not pertinent to the case at bar, since a Federal Statute does not govern the rights of parties. The Carriage of Goods by Sea Act is extended by contract rather than by force of law. If the contract is invalid, all the terms of the contract are invalid. This would not be so, had the crate actually been loaded on the "NEDERBURG" and a valid bill of lading issued.

CONCLUSION

The ocean carrier, having issued a bill of lading with a false "on-board" endorsement, knowing that such bill of lading would be negotiated through a bank to an innocent third party, who would rely thereon to his detriment, may not then use any of the defenses contained therein.

Plaintiff-consignee, the victim of the false bill of lading, is entitled to recovery in full for the loss it has suffered. The District Court's opinion, insofar as limiting plaintiff's recovery to \$500.00, should be reversed and remanded for a determination of appropriate damages.

Respectfully submitted,

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JOHN T. KOCHENDORFER
Of Counsel

Index No.

76-7510

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF N.Y.

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

BERGEN CO N.J.

That on

FEB 24 19 77

deponent served the annexed

REPLY BRIEF

on HILL RICKINS CAROL LOESBERG O'BRIEN
attorney(s) for

HAIGHT GARDNER POOR HAUENS

in this action at 96 FULTON ST. NY NY

1 STATE STREET PL. NY NY

the address designated by said attorney(s) for that purpose by depositing ²/₃ true copies same enclosed
in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

FEB 24, 1977

Andrew A. Fitzpatrick

David Kraus

The name signed must be printed beneath

DAVID KRAUS

ANDREW A. FITZPATRICK
NOTARY PUBLIC, State of New York
No. 30-4624891
Qualified in Nassau County
Cert Filed in New York County
Commission Expires March 30, 1978

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Index No.

	Plaintiff
against	
	Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on

19

deponent served the annexed

on

attorney(s) for
in this action at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

.....
The name signed must be printed beneath

Attorney at Law

